Supreme Court, U.S.
SEP 8 -

(7)

No. 08-1579

IN THE

Supreme Court of the United States

THE RECTOR, WARDENS AND VESTRYMEN OF ST. JAMES PARISH IN NEWPORT BEACH, CALIFORNIA, *ET AL.*,

Petitioners,

v.

THE PROTESTANT EPISCOPAL CHURCH IN THE DIOCESE OF LOS ANGELES, *ET AL.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of California

PETITIONERS' REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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[1] The Modification of Opinion issued by the California Supreme Court on February 25, 2009, was inadvertently omitted from the Appendix. It is included here, paginated sequentially from the original Appendix included with the Petition.

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ARGUMENT

I. The Decision Below Is Final With Regard to the Interpretation of *Jones v. Wolf*, §9142(c), and the Constitutional Issues Raised by Both.

The finality rule of 28 U.S.C. §1257(a) has "not been administered in such a mechanical fashion" as "to preclude review 'where anything further remains to be determined by a State court, no matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State.'" *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945). This Court has noted that "[t]here are now at least four categories" of cases where it will exercise jurisdiction despite further anticipated proceedings in the state courts. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975). A state court judgment can be final with respect to the federal issue, for example, when the federal issue is conclusive, or "where the federal claim has been finally decided" and later review of the federal issue may be foreclosed. *Id.*, at 479.

The decision below provides a final interpretation of California Corporations Code §9142(c) and its constitutionality. Indeed, Respondents have argued on remand that the decision below resolves the entire case. Petition for Writ of Mandate 17-19 (Cal.Ct.App., Aug. 12, 2009).[1] While the trial court

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[1] If the position Respondents have advanced on remand were correct, then finality jurisdiction would clearly be appropriate under the fourth *Cox Broadcasting* exception, which covers "those cases in which there are further proceedings—even en-

has correctly rejected Respondents' position that the California Supreme Court "closed the door" on all further litigation—the case went up on appeal before an answer to the Diocese's complaint had even been filed—the judgment interpreting a state statute and upholding its constitutionality can nevertheless be deemed "final" for purposes of §1257(a). As this Court noted in *Hudson Distributors v. Eli Lilly & Co.*, 377 U.S. 386, 389 n.4 (1964), a case that similarly involved a state court determination of the constitutionality of a state statute and remand for further proceedings, "[t]he fact that separate and unresolved issues are pending in the [state] courts and subject to 'further proceedings' therein . . . does not render the judgment of the [state] Supreme Court on the issue here considered and decided nonfinal or unappealable within the meaning of 28 U.S.C. §1257."

The decision below is also final with respect to the California Court's interpretation of the "neutral principles" approach ratified by this Court in *Jones v. Wolf*, 443 U.S. 595 (1979), specifically including that, in its view, crediting a general church canon purportedly enacted thirty years after a separately-incorporated local church took title to property is a constitutionally valid application of neutral principles of law that does not impermissibly decide matters of religious doctrine. That Petitioners will now have the opportunity on remand to raise other, state law grounds on which they might prevail places this

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tire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." 420 U.S., at 479.

case squarely within the fourth *Cox Broadcasting* exception:

> Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S., at 482-83.

It is undisputed that "[t]he deeds to the property have been in the name of" St. James Church ever since 1950, and also undisputed that neither the deeds nor any other conveyance from St. James Church ever created an express trust in favor of the Episcopal Church. Pet.App.5a, 27a. Reversal of the state court's determination on the federal issues would therefore very likely be dispositive under the pure neutral principles approach embraced by this Court in *Jones*.

Leaving the decision in place, on the other hand, could seriously erode this Court's strong preference for a neutral principles approach if Petitioners were to prevail on state law grounds after remand, leaving the California Court's unconstitutional interpretation of state law in place and beyond challenge. It would also exacerbate uncertainty regarding church property ownership, litigation over which has become endemic in the past decade. *See, e.g.*, B. Goodman, "A Church Is Divided, And Headed For Court," New York Times, A20 (Dec. 5, 2007) ("[Religious rifts] have flooded the courts with civil lawsuits over church property").

The very ability of local congregations to freely exercise their religion in church property to which they have title is at stake. This Court should exercise its discretion to review the matter now, providing the state courts greater clarity on how properly to apply "neutral principles of law" in resolving church property disputes before further loss of Free Exercise rights results. *Cf. Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) (calling uncertainty about First Amendment rights "intolerable").

Because there is sufficient finality on the federal constitutional questions presented by the decision below to qualify for this Court's review under *Cox Broadcasting*, §1257(a) is not a bar to this petition.

II. There Are No Adequate and Independent State Law Grounds Barring Consideration of the Constitutionality of §9142(c), or of the Erroneous Application of "Neutral Principles."

Respondents make two arguments in support of their contention that the decision below is supported by adequate and independent state law grounds: That the California Court reached the same conclusion under neutral principles of state law as it reached under §9142(c); and that the judgment was also based on the Court's holding under the state's anti-SLAPP statute.

With respect to the SLAPP argument, Petitioners agree that the judgment below affirmed reversal of the trial court's Anti-SLAPP ruling. Were that all it did, an argument that adequate and independent state law grounds supported the judgment might well be valid. But the Court below went beyond the first prong of the Anti-SLAPP analysis—whether the claims arose from protected speech—to the second prong of the analysis addressing the merits. Cal. Code Civ. Proc. § 425.16; Pet.App.10a, 172a. The Court below also affirmed reversal of the trial court's favorable ruling on Petitioners' Demurrer to the Complaint-in-Intervention that was filed by the Episcopal Church. BIO, at 9; Pet.App.7a-8a, 37a, 148a, 167a-169a. Because both rulings were tied to the Court's interpretation of §9142(c) and to its holding that §9142(c), so interpreted, met *federal* constitutional standards, Pet.App.35a, the first-prong SLAPP holding is not an *adequate* state law ground that would preclude this Court's review; it is not "sufficiently broad to maintain" the entire judgment.

Murdoch v. City of Memphis, 87 U.S. (20 Wall.) 590, 636 (1875).[2]

With respect to the neutral principles argument, Respondents' contention that the California Court merely applied neutral principles of law to reach the same conclusion that it reached under §9142(c), giving dispositive weight to a post-hoc Church canon, begs the second of the two questions presented in the petition for certiorari, namely, whether such an application of neutral principles can be sustained under the First Amendment. That is not an "independent" state law ground for the decision, but rather one tied directly to Petitioners' constitutional challenge, providing for jurisdiction in this Court. *See, e.g., Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 150, 152 (1984).

III. Respondents' Description of the *Jones* Neutral Principles Approach Demonstrates Why Certiorari Is Necessary.

In *Jones*, this Court identified the following neutral sources of law that might be consulted to resolve church property disputes: "the deeds to the property in dispute, the local church's articles of incorporation, the general church's constitution, canons, and rules, and relevant statutes, including statutes specifically concerning religious property." *Jones*, 443 U.S., at 600. Respondents read this passage as

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[2] *Miss. & Kan. Interurban Ry. Co. v. City of Olath*, 225 U.S. 185 (1911), is inapposite. There remained the prospect for either leave to amend or entry of final judgment, and of course the case did not address the fourth exception to finality from *Cox Broadcasting*, decided nearly sixty-five years later.

creating a strong presumption in favor of claims by the general church: "If courts found a provision in any of those sources restricting local church property use by a denomination and conferring a right to the property on the broader church, they enforced it." BIO at 20-21.

Respondents characterization of *Jones* is unbelievably far-reaching in its implications. Far from demonstrating that this case "does not raise any unresolved constitutional issues," it highlights just how profound the constitutional issues are. Here are just a few of them:

1. Does such a "thumb-on-the-scale" approach to church property disputes deprive local congregations of their Free Exercise right to organize their religious affairs as they see fit, or give an unconstitutional preference to hierarchical churches?

2. Can assertions of a trust interest, created unilaterally by the beneficiary of the interest and without ratification by the settler of the trust, in violation of long-standing neutral provisions of state law, be upheld when the claimant of the trust is a general church, without offending the Establishment and Free Exercise Clauses?

3. Even if unilateral assertions of trust interests made in a general church's canons can be upheld, can they be given retroactive effect without infringing the free exercise rights of local church congregations that purchased church property for their own use, free and

clear of any trust or reversionary interest by the general church?

Jones does not definitely answer any of these constitutional questions. Respondents' contention that no such questions remain demonstrates just how necessary further review by this Court is. Did this Court in *Jones* really intend to federalize state trust law, for example, requiring that a denominational trust rule enacted by a putative beneficiary must be given dispositive effect even if it cannot be enforced under neutral principles of state trust law, or did *Jones* instead mean that trust claims contained in general church canons would be enforced if enacted in compliance with neutral principles of state trust law? Not to get too much into the merits here, but the passage in *Jones* noting that the neutral principles method "relies exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges," 443 U.S., at 603, strongly suggests the latter. Certiorari is certainly warranted to consider whether California's adoption of the former is consistent with *Jones*, or constitutionally permissible.

a. The California Court's Interpretation of §9142(c) Likewise Raises Serious Constitutional Issues.

The California Court's interpretation of §9142(c) exacerbates the disconnect between the neutral principles approach sanctioned by this Court in *Jones* and the holding below. Far from being "consistent with how California courts treat all voluntary associations," as Respondents claim, we are aware of no other instance in which a voluntary association

can unilaterally create a trust interest for itself in the vested property rights of its members, and even a cursory reading of the cases relied upon by Respondents reveals that they do not authorize an association's taking of the vested property rights of its members.

The Most Worshipful Sons of Light Grand Lodge v. Sons of Light Lodge No. 9, 118 Cal.App.2d 78 (1953), for example, held that where *members* of a fraternal lodge depart, they cannot take the *lodge's* property with them. But St. James Church is not seeking to take property owned by another; it is merely retaining property *to which it has held clear legal title* for almost six decades. *Cal. Dental Ass'n v. American Dental Ass'n*, 23 Cal.3d 346 (1979), and *Gear v. Webster*, 258 Cal. App. 2d 57 (Ct. App. 1968), also relied upon by Respondents, both dealt with membership rules, not vested property rights. In neither case did the courts purport to allow self-creation by the general association of a trust interest in the vested property of the association's members.[3]

The mention in *Jones* of "state statutes governing the holding of church property" as one of the sources of neutral principles of law was likely not intended to refer to state statutes that allowed general

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[3] The charitable trust doctrine, which would allow *donors* to challenge whether funds given to a charity are being devoted to the purposes for which the funds were given, is likewise inapposite. The Episcopal Church is not a donor to St. James, and even if prior donors were parties to this suit, because St. James remains devoted to religious purposes, resolving such a claim would require resort to the "departure from doctrine" test that this Court has held to be unconstitutional. *Presbyterian Church v. Hull Church*, 393 U.S. 440, 443 and n.2 (1969).

churches to bypass the normal, "well-established concepts of trust and property law familiar to lawyers and judges" such as the requirement of the creation of a trust or reversionary interest be in writing, in a document signed by the settler of the trust or owner of legal title to the property. That California now allows such a thing raises serious First Amendment issues that ought to be reviewed by this Court.

IV. The State Court Split is Significant.

Respondents' argument that there is no split among the state courts warranting this Court's review appears to be based on the view that the neutral principles analysis has been fully developed and applied by this Court and uniformly followed by state courts. Quite apart from the obvious straw man arguments (such as the claim, at pages 32-33, that there is no state court split over the interpretation of §9142(c), a California statute), recent academic studies of this area of law correctly describe state court attempts to apply the neutral principles of law approach approved in *Jones* as a "welter of contradictory and confusing case law." J. Fennelly, "*Property Disputes and Religious Schisms: Who is the Church?*" 9 St. Thomas L. Rev. 319, 353 (Winter 1997).

Respondents also take issue with Petitioners' claim that some courts view a hierarchical deference approach as constitutionally compelled. Although the New Jersey Court noted that "neutral principles" is another acceptable method of adjudicating church property disputes, it specifically held that "[o]nly where no hierarchical control is involved, should the

neutral principles of law principle be called into play." *Protestant Episcopal Church in Diocese of New Jersey v. Graves*, 417 A.2d 19, 24 (N.J. 1980). The West Virginia Court reached the same conclusion in *Church of God of Madison v. Noel*, 318 S.E.2d 920, 923 (W. Va. 1984), finding that the First Amendment "dictate[d]" a deference to hierarchy approach once the church was determined to be hierarchical. Although that Court would, in *dictum* in a *footnote* in a *per curium* opinion, later recognize the constitutional validity of a neutral principles approach, it simultaneously reiterated that the longstanding position espoused in *Noel* was "[d]ue to First Amendment entanglement considerations." *Original Glorious Church of God in Christ, Inc. of Apostolic Faith v. Myers*, 367 S.E.2d 30, 33, 34 n.6 (W.Va. 1988). Thus, even if New Jersey and West Virginia have somewhat backed away from the hardline approach to hierarchical deference they originally took—a point recognized in the petition, at 31 n.13—both states have clearly adopted an approach different from other states.

Much more important is the stark split between California and Arkansas in the two cases currently pending before this Court. Respondents misread the footnote in *Arkansas Annual Conference of AME Church, Inc. v. New Direction Praise & Worship Ctr., Inc.*, 375 Ark. 428, 436 n.1 (2009), and elide over the language that makes their misreading evident. The argument that "AME did not make . . . before the circuit court" was that the local church had consented to the Dennis Canon-like amendment "by their silence," not that such an amendment existed at all. Indeed, the Arkansas Court specifically con-

sidered another provision of the general AME Book of Discipline providing that local church property "was to be held in trust for use of the members of the National AME under the rules of the *Book of Discipline*," yet still found in favor of the local church because nothing in its deeds suggested that the grantor "had the intention of creating a trust in favor of" the National AME. *Id.*, at 436-38.

Also important is the split among state courts over the retroactive effect of unilateral trust declarations in general church canons by the putative beneficiaries of the trust. Respondents largely ignore this split, referring to *another* Arkansas decision than the one cited in the Petition, which did not address the retroactivity issue, and ignoring entirely the Alabama and Connecticut decisions cited in the petition. And contrary to Respondents' intimation, the California Court below did not hold that the Dennis Canon merely restated prior policy of the Episcopal Church; it simply acknowledged that "a strong argument exists" for that position. Pet.App.28a. The split on retroactivity is real, and because St. James Church took title to its property long before the Dennis Canon was supposedly enacted, this case is an appropriate vehicle to address it.[4]

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[4] Respondents also claim that a 1991 amendment to St. James Church's articles of incorporation somehow ratified the Dennis Canon. There is no mention in the 1991 amendment of the Episcopal Church or its canons generally, much less the Dennis Canon in particular. Pet.App.162a. Quite the contrary; the 1991 amendment specifically authorizes the corporation, upon dissolution, to distribute its assets "to a nonprofit fund, founda-

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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tion, or corporation which is organized and operated exclusively for [tax-exempt] religious or charitable purposes."

APPENDIX

APPENDIX E

Filed 2/25/09 (corrected version of modification order previously posted this date)

IN THE SUPREME COURT OF CALIFORNIA

	)	
	)	S155094
	)	Ct.App. 4/3
EPISCOPAL CHURCH	)	G036096,
CASES	)	G036408 &
	)	G036868
	)	Orange County
	)	JCCP No. 4392
_____	)	

MODIFICATION OF OPINION

THE COURT:

The opinion herein, filed on January 5, 2009, and appearing at 45 Cal.4th 467, is modified as follows:

The first sentence in the second full paragraph on page 473 [Pet. App. 2a] is modified to read: "Applying the neutral principles of law approach, we conclude, on this record, that the general church, not the local church, owns the property in question."

The third full paragraph on page 476 [Pet. App. 8a] is modified to read: "We granted review to decide

whether this action is subject to the special motion to strike under Code of Civil Procedure section 425.16 and to address the merits of the church property dispute."

The first full paragraph on page 478 [Pet. App. 10a], under "B.," is modified to read: "Both lower courts also addressed the merits of the dispute over ownership of the local church — the trial court found in favor of the local church and the Court of Appeal found clear and convincing evidence in favor of the general church. We will also address this question, which the parties as well as various amici curiae have fully briefed. We will first consider what method the secular courts of this state should use to resolve disputes over church property. We will then apply that method to analyze the dispute of this case."

The first sentence of the first full paragraph on page 493 [Pet. App. 37a] is modified to read: "For these reasons, we agree with the Court of Appeal's conclusion (although not with all of its reasoning) that, on this record, when defendants disaffiliated from the Episcopal Church, the local church property reverted to the general church."

This modification does not affect the judgment.